

EXHIBIT 2

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
In Re: : 10-13553 (SCC)
: :
NORTH GENERAL HOSPITAL, : One Bowling Green
: New York, New York
Debtor. : February 15, 2011
-----X
OFFICIAL COMMITTEE OF UNSECURED : 10-04205
CREDITORS OF NORTH GENERAL :
HOSPITAL, et al., :
: :
Plaintiffs, :
: :
v. :
: :
THE DORMITORY AUTHORITY OF THE STATE :
OF NEW YORK, :
: :
Defendant. :
-----X

TRANSCRIPT OF MOTION TO DISMISS ADVERSARY PROCEEDING
AND PRE-TRIAL CONFERENCE
BEFORE THE HONORABLE SHELLEY C. CHAPMAN
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtor: ERIN ZAVALKOFF-BABEJ, ESQ.
Windels, Marx, Lane & Mittendorf
156 West 56th Street
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For Creditors Comm.: MARTIN G. BUNIN, ESQ.
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For Dormitory Auth.: DAVID NEIER, ESQ.
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(Appearances continued on next page)

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APPEARANCES CONTINUED:

MR. RICHARD STERN
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For the U.S. Trustee:

United States Trustee's Office
BY: ANDREA B. SCHWARTZ, ESQ.
Assistant United States Trustee
33 Whitehall Street
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1 THE COURT: Good morning. Please be seated.

2 Where is Mr. Simpson? Ah, you've changed.

3 MS. ZAVALKOFF-BABEJ: I have.

4 MR. NEIER: Your Honor --

5 THE COURT: Mr. Neier, how are you?

6 MR. NEIER: Good morning, Your Honor. I don't think
7 Mr. Simpson, you know, thought it prudent for him to go since
8 it was just a pre-trial conference on the adversary proceeding.

9 MS. ZAVALKOFF-BABEJ: So he sent me.

10 THE COURT: Okay. All right, well, I guess I can
11 understand that, although there were a number of things filed
12 on the docket in the last 24 hours and also matters pertaining
13 to the examiner that I had hoped to discuss.

14 So, are you comfortable with that?

15 (No verbal response)

16 THE COURT: All right. So why don't we take care of
17 the pre-trial first.

18 Is Ms. Schwartz going to join us?

19 MALE VOICE: She's in the hallway.

20 THE COURT: Okay. All right. Mr. Neier, Mr. Bunin,
21 the adversary.

22 MALE VOICE: Do you want us to get the U.S. Trustee?

23 THE COURT: No, we can do the adversary first.

24 MR. NEIER: The defendant is always happy to go
25 first.

1 MALE VOICE: Yes.

2 THE COURT: Whoever wants to speak first.

3 MR. JOHNSON: Your Honor, Mike Johnson on behalf of
4 the committee.

5 THE COURT: Good morning.

6 MR. JOHNSON: How are you?

7 THE COURT: Okay.

8 MR. JOHNSON: I'm not sure how Your Honor would like
9 to proceed this morning. You've been flooded, I think, with a
10 fair amount of paper --

11 THE COURT: I have.

12 MR. JOHNSON: -- over the past few business days --

13 THE COURT: Why don't we start with just confirming
14 what I have --

15 MR. JOHNSON: Okay, Your Honor.

16 THE COURT: -- so we make sure that I have
17 everything.

18 I have briefing on both the statute of limitations
19 issue which was submitted some time ago and I also have your
20 briefing on the recharacterization issue and I think that's all
21 that I expect to receive on the adversary. I don't know if you
22 folks were planning on submitting replies.

23 MR. NEIER: Your Honor, we had contemplated a reply
24 on the motion to dismiss but it's up to you. If you don't
25 think that would be helpful, then we're happy not to do it.

1 THE COURT: I guess there was one issue that I was
2 interested in having a reply to from Mr. Bunin and that is from
3 the committee -- I know that you'll do all the work -- and that
4 is Mr. Neier raised a point at the end of his brief relating to
5 the -- even if the debt were to be recharacterized the security
6 agreement would stay in place. It wasn't a large or lengthy
7 point but --

8 MR. JOHNSON: Yes, Your Honor, we're --

9 THE COURT: -- I would be interested in having a
10 written reply to that.

11 MR. JOHNSON: Sure, Your Honor. We'd be happy to do
12 that. In fact, we've already started to do a little bit of
13 research on that point.

14 THE COURT: Okay.

15 MR. JOHNSON: Does Your Honor have a date in mind?

16 THE COURT: I don't. I don't. I'll leave that to
17 you. Just some time -- you know, some time in the next two
18 weeks, why don't we say?

19 MR. JOHNSON: Yes, that would be fine, Your Honor.

20 THE COURT: So other than that, I don't have a firm
21 date.

22 MR. JOHNSON: Okay, Your Honor.

23 MR. NEIER: You know, that's the Dowsky case?

24 THE COURT: Yes.

25 MR. NEIER: Dowsky Island Properties?

1 THE COURT: Right.

2 MR. NEIER: It doesn't have a lot of discussion on
3 the point. The reason that we think it's important, just to
4 Mr. Johnson knows, is because in this case the 1989 mortgage is
5 still in effect.

6 THE COURT: Right.

7 MR. NEIER: And it's been amended a couple of times -
8 -

9 THE COURT: Right.

10 MR. NEIER: -- but it's still in effect and,
11 therefore --

12 THE COURT: Well, that's why I think it's an
13 interesting point.

14 MR. NEIER: Yes.

15 THE COURT: So --

16 MR. NEIER: I don't know if we actually said that in
17 the end of the brief as we were rushing to get it out the door
18 but that was --

19 THE COURT: No, but -- right. I think I assumed as
20 much and that's why I think I'd be interested hearing your
21 reply.

22 MR. JOHNSON: Yes. Absolutely. Well, you know,
23 there's always -- almost always in the case of secured lending
24 going to be some sort of lien or mortgage that's out there --

25 THE COURT: Right.

1 MR. JOHNSON: We can certainly address sort of how
2 most courts would address that.

3 THE COURT: Right. No, I understand that and I mean
4 I suppose if -- I don't want to open it up too much because I
5 really don't want an additional set of briefs but if there's
6 anything that you feel is particularly compelling that you'd
7 like to reply to feel free to do so.

8 MR. JOHNSON: Okay.

9 THE COURT: But it was a very helpful set of briefs.

10 I also got exhibits. I got the committee's exhibits;
11 two bound volumes of exhibits which were largely the loan
12 documentation, it looked like there were some e-mails in there
13 as well.

14 MR. JOHNSON: And some deposition transcript
15 excerpts.

16 THE COURT: Okay. All right.

17 MR. JOHNSON: There's one thing mechanically, Your
18 Honor, to consider as I've consulted with Mr. Neier on
19 deposition transcripts. We did do one non-party -- non-party -
20 - the adversary proceeding deposition. We took the deposition
21 of Dr. Daniel, the former CEO and president of the debtor and
22 Mr. Neier and I are in agreement that rather than subpoenaing
23 him to appear live --

24 THE COURT: Right.

25 MR. JOHNSON: -- we would be happy to rely on --

1 THE COURT: Just going to do designations and
2 counter-designations?

3 MR. JOHNSON: Yes. If Your Honor is okay with that -

4 -

5 THE COURT: Absolutely.

6 MR. JOHNSON: -- and there's not a hearsay problem
7 from Your Honor's perspective --

8 THE COURT: That's fine.

9 MR. JOHNSON: Okay.

10 THE COURT: That's fine.

11 MR. JOHNSON: Okay. There are some excerpts from his
12 deposition that are part of that compendium.

13 THE COURT: Okay. So that compendium represents the
14 universe of documents that you will draw from for your trial
15 exhibits?

16 MR. JOHNSON: That's correct, Your Honor.

17 THE COURT: Okay. Mr. Neier, did we get exhibits
18 from you?

19 MR. NEIER: You did get exhibits from me but we did
20 not put in our trial exhibits. Our trial exhibits will -- you
21 know, it won't be Boston Gen but it will be a real big --

22 THE COURT: Thank Heavens for some small things.

23 MR. NEIER: It will be a number of boxes.

24 THE COURT: Okay.

25 MR. NEIER: The loan documentation we think is

1 relevant, of course, is 1989, 1998, 2003. I'm endeavoring to
2 get the official transcripts just because they're bound volumes
3 and they're not BATES stamp numbered --

4 THE COURT: Right.

5 MR. NEIER: -- but they might be easier to go through
6 and then --

7 THE COURT: Okay.

8 MR. NEIER: -- I'm also going to obviously put in
9 officially the copies of those documents which have every page
10 BATES stamped and we'll have trial exhibits.

11 THE COURT: Okay.

12 MR. NEIER: Other than that it will be the documents
13 that we did submit which were just a handful of documents but
14 it will still be a substantial amount of paperwork and --

15 THE COURT: All right. In terms of live witnesses,
16 are we having live testimony?

17 MR. NEIER: We are having live testimony. I don't
18 think it will take particularly long but, obviously, I'm the
19 defendant. It might be different --

20 THE COURT: All right. And you're going to do --

21 MR. NEIER: As far as I know there are two witnesses;
22 Mr. Bolk and Mr. Tittle, the committee's expert.

23 THE COURT: Right. And I have their declarations
24 already. So are you going to rely on their declarations for
25 the direct?

1 MR. NEIER: Yes, Your Honor. From Mr. Bolk at least.

2 THE COURT: Okay.

3 MR. JOHNSON: Yes, that's correct, Your Honor.

4 THE COURT: Okay. All right. So what --

5 MR. JOHNSON: But there will be live cross-
6 examination and then redirect to the extent necessary.

7 THE COURT: Okay. So all in just on this and without
8 regard to other confirmation issues what's your estimate of the
9 amount of time that we need for this?

10 MR. NEIER: I was figuring on half a day, really. I
11 mean I don't think it's really that long.

12 MR. JOHNSON: I would rather to be on the safe side
13 set aside an entire day if we could?

14 THE COURT: Okay.

15 MR. JOHNSON: But I don't think it should go beyond a
16 single day.

17 THE COURT: Do you think we can do the entire
18 confirmation hearing in a day?

19 MR. JOHNSON: I'll let Mr. Bunin speak to that.

20 MR. BUNIN: The committee will be filing a
21 confirmation objection and so there will be argument with
22 respect to that.

23 THE COURT: Okay.

24 MR. BUNIN: But there is --

25 THE COURT: The unsecureds accepted, I noted.

1 MR. BUNIN: I did get some calls from some unsecured
2 creditors wondering where it's indicated where the recovery was
3 specified. I think -- I don't have any comment on that other
4 than, I guess, some unsecured creditors will say yes to just
5 about anything.

6 THE COURT: Yes, they will. But the med mal class
7 did not accept; right?

8 MR. BUNIN: There are some potential --

9 MR. NEIER: By one vote, Your Honor. Just one single
10 vote.

11 THE COURT: Right.

12 MR. BUNIN: There are some issues we're looking into
13 with respect to the ballots; whether -- there's at least one
14 creditor that we know who got both ballots to vote and a notice
15 that it couldn't vote and we're trying to --

16 THE COURT: Is that a difference that will make a
17 difference in light of the -- let me see. Because there were
18 quite -- the numerosity was carried by quite a large margin
19 wasn't it?

20 MR. NEIER: I think it's 52 to 16?

21 THE COURT: Yes.

22 MR. BUNIN: I don't know at this point, Your Honor.

23 THE COURT: All right. Well, needless to say, you
24 can do -- you know, you're free to do whatever you want to do
25 but if it's not going to make a difference it may not be worth

1 the effort.

2 MR. BUNIN: With respect to confirmation there is one
3 possible deposition that the committee may wish to take with
4 respect to confirmation.

5 THE COURT: All right. Well, I assume -- you've been
6 working together well so I assume you don't need me to get in
7 the middle of all that. You'll just let each other know what
8 you're planning to do.

9 MR. NEIER: You know, I personally think confirmation
10 is really going to be the March 10th time frame when we go
11 through the admin and priority claims.

12 THE COURT: When we go through the admin claims;
13 right.

14 MR. NEIER: That will really be whether we're even
15 there yet.

16 THE COURT: Right.

17 MR. NEIER: I'll tell you, Your Honor, we're still
18 short. We're short by -- we have a slight disagreement on the
19 numbers but we're short by \$3 million to \$4 million. Even if
20 Your Honor rules exactly as the debtors at DASNY requested in
21 the various claims objections -- and we haven't gotten very far
22 with Albany, in fact we've gotten nowhere but, you know, we're
23 continuing to try and nobody has told me stop work. I'm at
24 least hopeful that somebody will come up with the necessary
25 funds just to pay the priority and admin claims.

1 Ms. Hepner and I have had a conversation about that
2 because 87 percent of the priority and admin claims are to --

3 THE COURT: Are her folks.

4 MR. NEIER: -- are to the pension funds.

5 THE COURT: Right.

6 MR. NEIER: Not really her folks but they're the
7 ultimate beneficiaries of the pension fund --

8 THE COURT: Right.

9 MR. NEIER: -- and even assuming that the Court were
10 to rule in line with the objections, 87 percent of what would
11 left over would be the union or the pension funds and beyond
12 that the largest claim after that is another fund for the
13 committee of interns and residents. So about 95 percent of the
14 priority and admin amount that we hope is left over would go
15 towards these pension funds so we're trying to explore some
16 kind of innovative way to get through the hurdle.

17 I've told Ms. Hepner we're not going to go there
18 unless we absolutely need to but I think we are absolutely
19 going to need to and we'll have to see how they do on
20 confirmation as well.

21 THE COURT: All right. Well, this is why I'm sorry
22 that Mr. Simpson is not here today but Windels, Marx is here.

23 This is my segway to the examiner and to that whole
24 situation and the reason I'm segwaying on this point is because
25 to the extent that the work of the examiner -- and I'll get to

1 the latest round of correspondence that I received with respect
2 to what action Windels, Marx intends to take -- Ms. Schwartz,
3 to the extent that -- and I don't want to prejudge the issue --
4 but to the extent that the examiner's report as it may be
5 further supplemented -- and we'll get to that -- may provide a
6 basis for the United States Trustee objecting to the fees in
7 whole or in part of Windels, Marx leading to potential
8 disgorgement. Then timing and adjusting timing on the
9 resolution of that issue may provide funds that could help
10 enable this case to be confirmable with respect to the
11 administrative claims.

12 MS. SCHWARTZ: Andrea Schwartz for the United States
13 Trustee.

14 Your Honor, we got Mr. Simpson's letter -- a copy of
15 Mr. Simpson's letter yesterday and it was at our request that
16 Mr. Stern, the examiner, come today to this pre-trial
17 conference and he's here in the courtroom.

18 THE COURT: Okay.

19 MS. SCHWARTZ: We asked him to come because we also
20 had some questions with respect to the process.

21 As we see it, Your Honor, Your Honor entered an order
22 on January 6th appointing the examiner --

23 THE COURT: Right.

24 MS. SCHWARTZ: -- and forgive me for just briefly
25 running this down but you entered the order on January 6th

1 appointing the examiner. The order provides that no later than
2 February 10th the examiner was to issue his report.

3 THE COURT: Right.

4 MS. SCHWARTZ: In our case we had the benefit of an
5 examiner who worked very diligently and quickly --

6 THE COURT: Right. And issued the report early;
7 right.

8 MS. SCHWARTZ: January 31st he issued the report.

9 THE COURT: Right.

10 MS. SCHWARTZ: Then Your Honor had a conference with
11 all the parties here in chambers and it was clear that any
12 party that had any questions or concerns with respect to the
13 report could in fact contact the examiner which we understand -
14 -

15 THE COURT: And the committee did so.

16 MS. SCHWARTZ: -- we understand on multiple occasions
17 the committee did so and the examiner made himself available to
18 understand any issues and in fact on the morning of February
19 10th filed a supplement to his report.

20 THE COURT: Well, in the chambers conference my
21 recollection is that Mr. Simpson indicated his displeasure with
22 the report and his intention to file a reply and produce
23 voluminous documents that in his words would "cut against" the
24 examiner's conclusions.

25 MS. SCHWARTZ: Right. And I think where the U.S.

1 Trustee is coming down with respect to this is that she
2 believes in the integrity of the process and she also wants to
3 see the case moved towards confirmation and, you know, this is
4 Your Honor's order and this is Your Honor's directives with
5 respect to the examiner but as far as the United States Trustee
6 is concerned on Thursday the examiner had sent to us just for
7 comment a proposed discharge order --

8 THE COURT: Right. Which is where I thought we were
9 going until I received Mr. Simpson's letter but --

10 MS. SCHWARTZ: And I want to note, Your Honor, I'm
11 not sure Your Honor wants to consider that letter as part of
12 the record because it hasn't in fact been filed on the docket.

13 THE COURT: It was filed on the docket.

14 MS. SCHWARTZ: Oh, okay. This was yesterday --

15 THE COURT: Yes.

16 MS. SCHWARTZ: -- and it wasn't on the docket.

17 THE COURT: Right.

18 MS. SCHWARTZ: But now that it is at least part of
19 the court record --

20 THE COURT: Right.

21 MS. SCHWARTZ: -- you know, the order provided as
22 Your Honor is aware for a very short time frame for the
23 examiner to do his report --

24 THE COURT: Yes.

25 MS. SCHWARTZ: -- and a very limited amount of funds

1 to be --

2 THE COURT: Correct. Expended.

3 MS. SCHWARTZ: -- expended in connection with that.

4 At this point it appears that debtor's counsel did
5 not contact the examiner during that time period in between the
6 chambers conference except for yesterday.

7 Mr. Stern is here and he can speak for himself --

8 THE COURT: Right. Well, Ms. Schwartz -- yes, I
9 would like to hear from Mr. Stern -- but Mr. Simpson appears to
10 be taking the position that the reason for the delay is that he
11 needed to prepare and file numerous objections to proofs of
12 claim. While that's true, I was not entirely happy with the
13 fact that we got to where we got to and those objections had
14 not yet been filed. So I'm not sure that that stands as an
15 excuse for a delay in filing a response to the examiner but --

16 MS. SCHWARTZ: I think --

17 THE COURT: -- let me just continue for one second --

18 MS. SCHWARTZ: Yes, I apologize.

19 THE COURT: -- just to kind of play this out a little
20 bit because if we had no confirmation issues what would happen,
21 I think, in this case is we would get to the end of the case
22 and then there would be fee applications and I'm guessing that
23 the U.S. Trustee would file an objection to Windels, Marx' fees
24 and as was the case in Leslie Fay and other cases, the
25 misconduct if you will -- although that's a strong word --

1 identified by the examiner may well form the basis for an
2 objection to the payment of further fees and a basis for an
3 order of disgorgement to compensate the estate for what
4 happened and to defray the cost of the examiner. In other
5 words, if the conduct is found to have occurred and that
6 conduct necessitated the appointment of an examiner and the
7 examiner in fact found that the conduct occurred, then I think
8 there's authority for the subject of the examiner's report to
9 defray the cost of the examiner.

10 So in a normal case that would all play out at the
11 end. If we discharge the examiner now and do not allow this to
12 play out as Mr. Simpson would like it to play out, then the
13 Court will not have the benefit of the examiner's response to
14 what Windels, Marx puts forward.

15 MS. SCHWARTZ: Well, I am 100 percent with Your
16 Honor's thought process and train --

17 THE COURT: Okay.

18 MS. SCHWARTZ: -- and I have a thought with respect
19 to that.

20 THE COURT: Okay.

21 MS. SCHWARTZ: And that is that it is an alternative
22 that in the order discharging the examiner the Court provide
23 for the examiner to be able to participate at the Court's order
24 and direction with respect to any evidentiary matters that
25 arise with respect to any potential objection to fees or motion

1 for disgorgement with respect to the fees.

2 THE COURT: How about -- let me make a
3 counterproposal and --

4 MS. SCHWARTZ: It was just a suggestion.

5 THE COURT: -- we need to hear from Mr. Stern. I
6 also need to hear from Mr. Stern in terms of the amount of fees
7 that have been incurred to date.

8 My countersuggestion would be -- and, again, to pick
9 up on preserving some ability to bring this to a head in
10 conjunction with confirmation -- is that I extend the deadline,
11 allow for Mr. Simpson to file what he says he's going to file
12 which is -- and he says it's going to be -- well, he says he's
13 going to be available from and after tomorrow --

14 MS. SCHWARTZ: Right. I didn't know that he was
15 going to -- I think he extended an invitation to the examiner
16 to come to his office.

17 THE COURT: Yes, it is an invitation.

18 What I would like to do is to give him a firm
19 deadline, particularly since we've pressed Mr. Westin in
20 service with regard to other matters pertaining to the debtors
21 and that at this point other than with respect to the
22 prosecution of the objections to the administrative claims it's
23 largely in the hands of Mr. Neier and Mr. Bunin with respect to
24 confirmation and in fact it's largely in the hands of Mr. Neier
25 in terms of keeping the lines of communication open to Albany.

1 So what I would be inclined to do subject to your
2 rights to be heard is to place a deadline for a production of
3 any documents that Windels, Marx wishes to produce and a
4 deadline for any meeting that Windels, Marx wishes to have with
5 the examiner subject to Mr. Stern's schedule and that the
6 appointment be extended through a date to allow Mr. Stern time
7 to review whatever documentation or listen to whatever further
8 matters Mr. Simpson wishes to bring to his attention and to
9 have Mr. Stern file one more final report and then we discharge
10 him and we consider his fee application and then he's done.

11 I'm not inclined, Ms. Schwartz, to have Mr. Stern
12 have to hang around for a fee hearing and then I would look to
13 the U.S. Trustee to figure out whether or not there's some
14 mechanism after Mr. Stern issues his final supplementary report
15 to bring the issue of fees to a head sooner rather than later
16 so that if we have a gap -- and, ultimately, there would be a
17 disgorgement of fees -- that we have those funds available to
18 help get this case confirmed.

19 I realize that there's probably no precedent for this
20 and it's a little unorthodox but it makes sense to me as I'm
21 saying it.

22 MS. SCHWARTZ: Well, let's talk about it in a few
23 separate steps.

24 THE COURT: Okay.

25 MS. SCHWARTZ: I'm going to back it out from the fee

1 part.

2 First of all, in order for us to take any action
3 other than a motion to disgorge --

4 THE COURT: Right.

5 MS. SCHWARTZ: -- fees that have already been paid --

6 THE COURT: Right.

7 MS. SCHWARTZ: -- we have to have the fee application
8 -- the actual fee application from Windels, Marx.

9 THE COURT: Well, but we have --

10 MS. SCHWARTZ: We have their monthlies but we --

11 THE COURT: But on the fee application that we spent
12 so much quality time talking about two days before Christmas --

13 MS. SCHWARTZ: Right.

14 THE COURT: Right? I did enter an order --

15 MS. SCHWARTZ: True quality.

16 THE COURT: -- approving those fees.

17 MS. SCHWARTZ: Yes, that's right.

18 THE COURT: So I think that in excess of \$1.3 million
19 has already been paid to Windels, Marx.

20 MS. SCHWARTZ: Right. Okay. So I think what Your
21 Honor is saying is that the U.S. Trustee is at the point --
22 that it's ripe at this point -- well, we have to really wait
23 for any --

24 THE COURT: We'd have to wait for -- right.

25 MS. SCHWARTZ: Right. But I think the other thing

1 that is important here is that in order for us to prosecute our
2 motion, assuming we file a motion to disgorge or we file an
3 objection, in order for us to prosecute that motion we very
4 well may need the testimony of the examiner with respect to
5 that and that's --

6 THE COURT: Okay. That's fair but I'd like the
7 documentary record to be closed so that's why I'm not inclined
8 to let Mr. Stern off the hook yet when Mr. Simpson has said he
9 wants to come back in for one more round which I, frankly, had
10 thought would have already taken place but it didn't.

11 MS. SCHWARTZ: The only problem I have at this point
12 -- and it's because we're just talking about it here today --

13 THE COURT: Right.

14 MS. SCHWARTZ: -- is that the U.S. Trustee is her own
15 separate party --

16 THE COURT: Yes.

17 MS. SCHWARTZ: -- so the examiner does not work for
18 the U.S. Trustee.

19 THE COURT: Understood.

20 MS. SCHWARTZ: So, therefore, the documents that are
21 produced to the examiner are not produced to the U.S. Trustee -
22 -

23 THE COURT: Right.

24 MS. SCHWARTZ: -- and we don't want to be in the
25 position where we have the applicant disputing what our view is

1 with respect to the documents that have been found by the
2 examiner. Do you follow what I'm saying?

3 THE COURT: Right. But I am looking at -- the U.S.
4 Trustee is absolutely her own party-in-interest and can do
5 whatever she thinks is appropriate but what I don't want to
6 happen is I've read the examiner's report, I've read the
7 supplemental report and I don't want to have to walk out
8 fifteen minutes before the movie is over with respect to the
9 examiner when the examiner is going to have further
10 conversations with Mr. Simpson and his folks and it would be
11 helpful to the Court to have the benefit of his observations in
12 that regard.

13 MS. SCHWARTZ: Oh, I agree, and I'm sure that we're
14 going to rely -- I mean the foundation for at least, you know,
15 a part of our position is going to be the examiner's report.

16 THE COURT: Right. But without prejudice to --

17 MS. SCHWARTZ: And I think what Your Honor is saying
18 is we don't want to relitigate the same issues between the two
19 --

20 THE COURT: And that's precisely why --

21 MS. SCHWARTZ: And we don't either.

22 THE COURT: Right. That's precisely why I think it
23 doesn't make sense to let off with the examiner before it's
24 over so that we have the benefit of the full -- Mr. Stern,
25 could you come up?

1 MS. SCHWARTZ: Yes, I think at this point you need to
2 hear from Mr. Stern with respect to --

3 THE COURT: I'm very sorry that Mr. Simpson isn't
4 here today but time is of the essence.

5 MR. STERN: Good morning, Your Honor. Richard Stern
6 from Hughes, Hubbard.

7 THE COURT: Good morning, Mr. Stern.

8 MR. STERN: A couple of observations --

9 THE COURT: Sure.

10 MR. STERN: -- and I appreciate you hearing us this
11 morning.

12 I guess there are two issues; one is the fee issue
13 and I've listened this morning --

14 THE COURT: Your fees or --

15 MR. STERN: Sorry, my fees.

16 THE COURT: Your fees are going to be taken care of
17 no matter what but go ahead.

18 MR. STERN: I appreciate that, Your Honor, but just
19 listening this morning as to the administrative burden on this
20 estate I was also concerned about, you know, additional fees
21 for myself and my attorneys. That's one issue.

22 The second issue is we obviously have a process where
23 it's a cooperative process in that the process that I tried to
24 invoke in preparing the initial report as well as the
25 supplemental report; Mr. Bunin contacted me a number of times,

1 we had a number of conversations, I took his comments into
2 consideration and I filed a revised report. Similarly, Mr.
3 Westin called me. He had one issue, I talked it out with him
4 and he concluded that no change to my report was necessary. I
5 gave him the opportunity to talk to his client and advise me if
6 from their perspective any changes were necessary and he got
7 back to me and said they were not requesting any --

8 THE COURT: And by "his client" you mean Mr. Maher?

9 MR. STERN: Mr. Maher; yes.

10 THE COURT: Okay.

11 MR. STERN: I heard nothing from Windels, Marx which
12 was their prerogative.

13 What I'm concerned about now is that we'll go through
14 the same what I'll call cooperative process; I'll listen to
15 them, I'll meet with them, I'll get the information and then
16 I'll file a supplemental report if necessary and then we get to
17 the litigation part and they start deposing me and serving me
18 with subpoenas, calling me as a witness. So we duplicated the
19 effort in a sense and given them the opportunity of a
20 cooperative process but then they may take advantage of a
21 litigious process and I've heard the U.S. Trustee's
22 representative, Ms. Schwartz, talk about potentially having me
23 as a witness and what I'm concerned about is the burden on the
24 estate and the duplication from going through an additional
25 cooperative process and then a litigation process.

1 THE COURT: Right. I think that the issue of your
2 being, you know, put on the firing line exists whether or not
3 you file a further supplement because if you don't file a
4 further supplement and Mr. Simpson and Windels, Marx produces
5 documents and takes the position that you were wrong, then in
6 the context of the fee dispute if the U.S. Trustee chooses to
7 proceed we're going to need to hear from you anyway.

8 When we undertook this, though, there was the
9 agreement of all parties that your fee -- that the examiner's
10 fees were going to be covered and that has to be the case,
11 otherwise, in this kind of a situation the estate wouldn't have
12 the benefit of the examiner and it's my view that the
13 examiner's fees are going to be paid for so-to-speak either
14 through -- the estate is going to be compensated for the
15 examiner's fees either eventually through disgorgements in
16 litigation that's obtained or through fitting you into whatever
17 budget is left.

18 So I have no intention of having you work and not be
19 compensated including if you're dragged into litigation
20 pursuant to any fee matters that the U.S. Trustee raises.

21 Where is your firm now with respect to accrued fees
22 and expenses?

23 MR. STERN: We're well in excess of the cap, Your
24 Honor. I'd say without some cuts which I'm going to take we're
25 at about \$150,000.00 but I'm going to reduce that based on a

1 number of issues.

2 MS. SCHWARTZ: Just to refresh your recollection,
3 Your Honor, the order provided for \$100,000.00.

4 THE COURT: I know. I know that.

5 MR. STERN: And I'm cognizant of that and, frankly,
6 I'm prepared to just take \$100,000.00 given that that was the
7 cap but I think going forward I would ask Your Honor --

8 THE COURT: Well, you can put in a fee application
9 with your actual fees and expenses and we can have a discussion
10 with all parties as to whether or not we can get relief from
11 that cap but I'm just thinking about the points that you're
12 making and you're raising some good points about duplication of
13 effort.

14 I suppose -- and I'm thinking out loud here -- that
15 to the extent that Windels, Marx submits additional documents
16 and submits a writing that sets forth a basis for me to
17 conclude that your conclusions were not supported or wrong, I
18 can make my own judgment as to whether I agree with that or not
19 without your putting in a response and to the extent that I
20 can't come to my own conclusion I suppose I can always ask you
21 for your input without your having to file a whole additional
22 supplemental report.

23 Ms. Schwartz, do you agree with that?

24 MS. SCHWARTZ: I do agree with that, Your Honor, and
25 I mean it's an interesting discussion that we're having here

1 because I think we're all trying to arrive at what the best --
2 the most efficient way is --

3 THE COURT: Most economic; right.

4 MS. SCHWARTZ: Most economic and also how do we get -

5 -

6 THE COURT: The truth.

7 MS. SCHWARTZ: -- the case to confirmation --

8 THE COURT: Right.

9 MS. SCHWARTZ: You know, our overall case is to get
10 the case to confirmation.

11 So in that vein, Your Honor could enter the discharge

12 --

13 THE COURT: Right.

14 MS. SCHWARTZ: I mean could enter the discharge order
15 now --

16 THE COURT: Right.

17 MS. SCHWARTZ: -- and, you know, the discharge order
18 could contain certain provisions addressing the various things
19 that Your Honor has raised here, set a deadline and, I would
20 suggest, a very tight deadline because, you know, Your Honor,
21 it appears that all the other parties were able to contact Mr.
22 Stern during the time frame that Your Honor originally set --

23 THE COURT: It does.

24 MS. SCHWARTZ: -- and that let Windels, Marx file
25 whatever they want to file with respect to the report.

1 THE COURT: All right. So let's do that, Mr. Stern.

2 MR. STERN: Can I just add -- excuse me, Your Honor.

3 THE COURT: Go ahead.

4 MR. STERN: One other possibility which would be --
5 and this is unique -- but basically give Windels, Marx a
6 choice; have me stay on, listen to them and file a supplemental
7 report and as part of that agree not to litigate over the
8 report or --

9 THE COURT: I don't think he's going to do that
10 because he's going to litigate with the U.S. Trustee and to the
11 extent that the U.S. Trustee may rely on the work that you did,
12 I think which they're entitled to rely on -- Mr. Neier, you're
13 the money man so let me hear from you.

14 MR. NEIER: Yes. First of all, I would just suggest
15 to the Court that the Court has wide discretion as to what the
16 examiner's functions are going forward and even whether the
17 examiner can be called as a witness or as you suggest just come
18 back to court and give an oral report. Judge Carey in the
19 Tribune case, which actually is on for a hearing today and
20 quite a contested one, discharged the examiner even though
21 there's a competing plan battle and both sides wanted the
22 examiner to testify, discharged the examiner and forbid anybody
23 from conducting discovery against the examiner or, you know,
24 compelling the examiner to testify at the confirmation hearing
25 with competing plans and I think that basis does exist.

1 THE COURT: Okay.

2 MR. NEIER: There is precedent for the Court to
3 terminate how the examiner responds to things and --

4 THE COURT: Well, as I said --

5 MR. NEIER: -- I don't think the process --

6 THE COURT: Right.

7 MR. NEIER: -- with all due respect to the U.S.
8 Trustee's Office, I don't think there is a process for an
9 examiner's report. I don't think there is a report and then
10 there has to be a response.

11 THE COURT: No, I totally agree with that but --

12 MS. SCHWARTZ: I don't think we said that.

13 THE COURT: Yes. As I'm thinking about it I think
14 that to the extent that Windels, Marx wants to make a
15 submission it can make a submission. It can make the
16 submission to the Court and I'm perfectly capable of comparing
17 the submission to Mr. Stern's report and coming to my own
18 conclusion --

19 MR. NEIER: Or inviting a response if you want.

20 THE COURT: -- or inviting a response or submitting
21 questions to Mr. Stern.

22 So I think that I'm at a decision point. What I'd
23 like to do is discharge Mr. Stern. Windels, Marx is free to do
24 whatever it wants. Mr. Stern will be discharged as of the time
25 that I enter the order.

1 Mr. Stern, you should submit a fee application
2 reflecting all of the time and fees -- fees and expenses that
3 you have incurred. I know that you're cognizant of the cap but
4 put it in and let's see if there's a basis for relief from the
5 cap. The U.S. Trustee may have a position in that regard but
6 now that -- and then we can cross the bridge of whether or not
7 -- once you're discharged you're not obligated to respond to
8 Windels, Marx. If they issue a subpoena in connection with
9 further proceedings in the court we can deal with that then as
10 Mr. Neier suggests.

11 MS. SCHWARTZ: And, obviously, we'll reserve all our
12 rights with respect to --

13 THE COURT: Right.

14 MS. SCHWARTZ: -- being able to call the examiner or
15 what discovery with respect to that. Clearly, this is not the
16 Tribune case and I'm not sure what Judge Carey -- why Judge
17 Carey ruled the way he ruled but we'll just reserve all our
18 rights with respect to that.

19 THE COURT: Right. I think --

20 MR. NEIER: I think it's because Mr. Clay didn't want
21 the job basically.

22 THE COURT: Well, I think Mr. Stern would be happy to
23 have the job but he's being sensitive to the money constraints
24 that we have in this case which are significant.

25 MR. NEIER: Your Honor, just two points.

1 I think Mr. Simpson would have been here had he known
2 that the U.S. Trustee's Office had invited Mr. Stern. Nobody
3 told him that.

4 THE COURT: I understand and I can imagine that Mr.
5 Simpson is going to be very unhappy --

6 MR. NEIER: I would think so.

7 THE COURT: -- but there's a representative of his
8 firm here --

9 MS. SCHWARTZ: That's right and, Your Honor --

10 MR. NEIER: Yes, Your Honor.

11 THE COURT: And, you know --

12 MR. NEIER: I'm just saying that the Court shouldn't
13 hold it against him for not being here because --

14 MS. SCHWARTZ: And I don't think Mr. Neier represents
15 Mr. Simpson. I mean at this point --

16 THE COURT: Ms. Schwartz, I am in no way holding it
17 against Mr. Simpson but the fact is that lawyers often forget
18 that they're not individually the counsel, the law firm is and
19 the law firm is here.

20 MR. NEIER: Yes, Your Honor.

21 THE COURT: So --

22 MR. NEIER: I'm just -- the Court had expressed some
23 unhappiness that he's not here. Had I known that the examiner
24 was --

25 THE COURT: Not unhappiness. You know, given how

1 near and dear this case is to his heart I had expected to see
2 him here but it's fine that he's not here.

3 MS. SCHWARTZ: And, Your Honor, we're actually
4 surprised that he's not here too, because we asked the examiner
5 to come here in light of Mr. Simpson's letter that we received
6 yesterday.

7 MS. ZAVALKOFF-BABEJ: In all fairness, Your Honor --

8 THE COURT: Yes.

9 MS. ZAVALKOFF-BABEJ: Windels, Marx.

10 THE COURT: Identify yourself for the court reporter,
11 please.

12 MS. ZAVALKOFF-BABEJ: It's Erin Zavalkoff from
13 Windels, Marx on behalf of North General.

14 I believe that subsequent to Mr. Simpson sending this
15 letter out that he would like to get this response to the Court
16 by tomorrow --

17 THE COURT: Okay.

18 MS. ZAVALKOFF-BABEJ: -- end of day and that's really
19 why he sent me down --

20 THE COURT: Okay.

21 MS. ZAVALKOFF-BABEJ: -- because I don't believe he
22 was under the impression that this would be discussed today.
23 He really thought that it would just be the pre-trial that was
24 taking place.

25 THE COURT: All right. Well --

1 MR. NEIER: And before anybody agrees on a deadline
2 of tomorrow I'd just point out that we had this chambers
3 conference on Thursday --

4 THE COURT: Yes, we did.

5 MR. NEIER: -- and Mr. Simpson said he'd get all the
6 objections on file on Monday.

7 We worked night and day over the weekend to Wednesday
8 to get all these objections out. Mr. Westin's firm, Mr.
9 Simpson's firm, our firm, we worked very hard. It was a
10 monumental effort. Whatever the Court thinks about whether the
11 examiner's report should have been responded to before then,
12 there is no question that the last week has been a very trying
13 week for everybody.

14 THE COURT: Understood. No, I understand and that's
15 why it's completely understandable to me that he didn't -- and
16 to his credit he put the interests of the estate first and I
17 appreciate that. I was merely commenting on the possibility
18 that the admin claims could have been objected to much earlier.

19 MR. NEIER: Yes, Your Honor.

20 THE COURT: So, but look, I've learned in this case
21 it is what it is, we have to go from where we are. Nothing
22 that I'm saying is intended to be critical of Mr. Simpson. No
23 decisions are being made here today other than the examiner is
24 going to be discharged and that Windels, Marx is free to pursue
25 the course of action that it set forth in its letter but Mr.

1 Stern is going to be discharged so --

2 MS. ZAVALKOFF-BABEJ: I think Windels just would like
3 the opportunity, obviously, to address what the examiner --

4 THE COURT: Certainly. Right.

5 MS. ZAVALKOFF-BABEJ: -- stated in his report.

6 THE COURT: Right. And Windels, Marx can file that
7 on the docket and there it is.

8 MS. ZAVALKOFF-BABEJ: Correct.

9 THE COURT: Mr. Bunin.

10 MR. BUNIN: Your Honor, Marty Bunin for the creditors
11 committee.

12 The committee doesn't take a position with respect to
13 the examiner issues and we'll be guided by Your Honor.

14 THE COURT: Okay.

15 MR. BUNIN: I do want to say though I just want to
16 make sure I understand where things are going.

17 So if I understand correctly Mr. Stern will be
18 discharged, Windels, Marx will have an opportunity to file --

19 THE COURT: Whatever it wants.

20 MR. BUNIN: -- whatever it wants.

21 THE COURT: Right.

22 MR. BUNIN: And then if Mr. Stern determines to file
23 a supplement after his --

24 THE COURT: No, no supplement.

25 MR. BUNIN: There won't be a supplement.

1 THE COURT: No supplement. No supplement.

2 If I after reading Windels, Marx reply am scratching
3 my head and I can't figure something out, then I'm reserving my
4 rights to ask questions of Mr. Stern but I think I can look at
5 the two submissions and form a conclusion.

6 MR. BUNIN: I just would note, Judge -- and I had
7 mentioned this to Mr. Stern in one of our conversations before
8 February 10th -- in the Enron case Judge Gonzalez noted on the
9 record with respect to a response filed by an accounting firm
10 to one of the examiner's reports that there was no provision in
11 the Code for filing responses or making submissions objecting
12 to or commenting on examiners reports and --

13 THE COURT: Well, I think that's absolutely accurate.
14 On the other hand, there's no provision for it but there's also
15 no prohibition on it and to the extent that the examiner has
16 made what I would characterize as serious accusations against
17 the firm I think it's their right to file something that in
18 their view disputes those conclusions. Whether or not they can
19 get compensated for that exercise is a whole different story --
20 just a whole different story.

21 MR. BUNIN: Thanks, Judge.

22 THE COURT: Okay.

23 MR. BUNIN: I just wanted to make sure I understood
24 where we were going.

25 THE COURT: Yes. Okay. All right.

1 So because Mr. Simpson is not here perhaps we won't
2 discuss any further the suggestion that I made with respect to
3 any action that the U.S. Trustee might deem appropriate with
4 regard to fees but I would encourage the parties to talk about
5 that among themselves after -- Ms. Schwartz, I know you would
6 need to talk to the U.S. Trustee.

7 MS. SCHWARTZ: The only thing I was going to say is -
8 - obviously, I need to speak to the U.S. Trustee but I mean to
9 the extent that we have issues that are ripe now, the U.S.
10 Trustee may take action now and that's not to say that the
11 committee may not take action. I mean certainly any party-in-
12 interest that has an obligation -- a fiduciary obligation to
13 the creditors of the estate, you know, may take action.

14 I mean I haven't spoken with the committee with
15 respect to that.

16 THE COURT: Right. Without prejudging the issue I
17 merely made the observation in light of Mr. Neier's report that
18 we are "short" money and I have a fair amount of skepticism
19 about his ability to get more money out of Albany, although I
20 appreciate the effort but I don't want this thing to fail.

21 MS. SCHWARTZ: Right. Well, fortunately, we don't
22 file fee apps.

23 THE COURT: Right. So someone will submit -- I don't
24 know if the -- I haven't seen a discharge order. I don't know
25 if it needs to be revised.

1 MS. SCHWARTZ: The examiner will submit that to Your
2 Honor --

3 THE COURT: Okay.

4 MS. SCHWARTZ: -- and I think the examiner is still
5 looking at just getting the form of it in order.

6 THE COURT: Okay. All right.

7 MR. STERN: That's right, Your Honor. Thank you.

8 THE COURT: Okay. All right. So we're done with
9 that.

10 Ms. Schwartz, I'll leave it in your hands as to what
11 happens with respect to fees. I think we're clear that
12 Windels, Marx can do whatever it feels it needs to do but it's
13 going to be in the form of something filed on the docket with
14 no expectation that Mr. Stern is going to respond. All right?

15 MS. SCHWARTZ: Correct.

16 THE COURT: Are we now all done with filing the
17 objections to the administrative claims?

18 MR. NEIER: I believe that's correct, Your Honor. I
19 do have a --

20 THE COURT: There was a motion to shorten; right?

21 MR. NEIER: I do have a by-hand package containing
22 the motion to shorten, although we did send the Word version of
23 the order to Your Honor's --

24 THE COURT: I have it. Yes, I have it.

25 So should I enter that today?

1 MR. NEIER: Yes, Your Honor, because we think that
2 there's plenty of time between now and March 10th to respond --

3 THE COURT: Okay.

4 MR. NEIER: -- and we don't think that these are
5 among the more complicated.

6 THE COURT: All right. So I'll grant the motion to
7 shorten.

8 MR. NEIER: Thank you, Your Honor.

9 THE COURT: And then I'm just paging through
10 everything else that I've gotten and then I also notice that
11 there's a notice of presentment for a plan exclusivity
12 extension.

13 MS. ZAVALKOFF-BABEJ: Correct.

14 THE COURT: And I understand there's no objection to
15 that.

16 MS. ZAVALKOFF-BABEJ: Correct, Your Honor.

17 THE COURT: All right. So the presentment date on
18 that is the 18th. Assuming no objection I'll enter that.

19 That leads us to next week which is the target date
20 for filing the modified plan and the other documents.

21 MR. NEIER: Your Honor, Mr. Westin has circulated the
22 changes he would propose to make and the parties have
23 tentatively scheduled Thursday afternoon as the page turn
24 ceremony --

25 THE COURT: The page turn ceremony.

1 MR. NEIER: -- that we're going to have.

2 MS. ZAVALKOFF-BABEJ: With respect to that, Your
3 Honor, Mr. Westin sent us -- we just got a copy of their draft
4 so we'll also endeavor to take a look at that particularly with
5 the issues that are of particular concern to our office.

6 THE COURT: Okay.

7 MS. ZAVALKOFF-BABEJ: We won't participate in a page
8 turn --

9 THE COURT: Right.

10 MS. ZAVALKOFF-BABEJ: -- but we will attempt to give
11 comments there.

12 THE COURT: Okay.

13 MS. ZAVALKOFF-BABEJ: And also, Your Honor should be
14 expecting shortly a supplemental application with respect to
15 Mr. Westin, Mr. Westin's firm in accordance with Your Honor's
16 direction.

17 THE COURT: Okay.

18 MR. NEIER: Mr. Westin also was involved very heavily
19 in the priority and admin claims so he may have had some delay
20 in getting that out.

21 THE COURT: Okay. All right.

22 MS. SCHWARTZ: No, we've seen it.

23 MR. NEIER: Okay.

24 THE COURT: Mr. Bunin, you've done your own analysis
25 of the existing documents? When we were here last this all

1 started -- the page turn concept started with your observations
2 about inconsistencies among the plan documents. So have you
3 been working with Mr. Westin or you've done your own thing?

4 MR. BUNIN: After the last conference, Judge, I had
5 an outline, Your Honor will recall, of some selected comments -
6 -

7 THE COURT: Right.

8 MR. BUNIN: -- which I furnished separately by e-mail
9 both to Mr. Westin and Mr. Simpson. We did not see or have any
10 conversations after that with regard to Mr. Westin's mark-up of
11 the plan but the committee has been invited to the Thursday
12 page turner and we'll be attending.

13 THE COURT: Okay. Great. You'll also need to -- by
14 the 25th I think it was contemplated that you would identify a
15 new trustee for the liquidating trust; right? Mr. Neier?

16 MR. NEIER: Well, I'm going to defer to the Court in
17 terms of picking a liquidating trustee. If the Court wants
18 DASNY's input, I'd rather not be the person selecting the
19 trustee, I'd rather be --

20 THE COURT: Well, the debtor is going to make the
21 selection with the input of the committee.

22 MR. BUNIN: I assume that after the page turner is
23 completed the parties will have a discussion about who an
24 appropriate person would be to be the liquidating trustee.

25 THE COURT: Okay. All right. I mean my observation

1 at the conference was that I viewed my role as approving or
2 disapproving but not picking -- no selecting -- and I think you
3 all agreed to that.

4 MR. NEIER: I was just trying to put myself in the
5 same camp, Your Honor.

6 THE COURT: Okay. Fair enough.

7 All right. Anything else?

8 (No verbal response)

9 THE COURT: Okay. Onward and upward.

10 Thank you, folks, very much. We're adjourned.

11 MS. SCHWARTZ: Thank you, Your Honor.

12 THE COURT: Oh, one more thing. This is Mr.
13 Schneiderman's last appearance in this case. He's moving on
14 for bigger and better things after having served for a year and
15 Ms. Edelbaum and Ms. Eisen will be picking things up after
16 that.

17 So, just to let you know.

18 MR. BUNIN: I mentioned to Mr. Schneiderman on the
19 phone yesterday that now that Eric Schneiderman has filed
20 papers in the case it's probably good in a sense that the other
21 Schneiderman is gone and we only have one Schneiderman to deal
22 with.

23 MR. NEIER: And it's really great that the Department
24 of Labor is asking for \$12.3 million in admin and priority
25 claims and the plan is sponsored by DASNY. So we're really in

1 great shape, Your Honor.

2 THE COURT: I will make no comment on that.

3 All right, folks, thank you.

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C E R T I F I C A T I O N

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I certify that the foregoing is a transcript from an electronic sound recording of the proceedings in the above-entitled matter.

S/ Carla Nutter

CARLA NUTTER

Dated: February 15, 2011

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